

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

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4
5 **ALWIN CAMACHO-MORALES,**

6 **Plaintiff,**

7 **v.**

8 **HECTOR PEQUERA, et al.,**

9 **Defendants.**

Civil No. 12-1533 (GAG)

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11
12 **OPINION AND ORDER**

13 Alwin Camacho-Morales (“Plaintiff”) alleges constitutional violations against several current
14 and former Puerto Rico police and Federal Bureau of Investigation (“FBI”) officers (collectively
15 “Defendants”) pursuant to 42 U.S.C. § 1983 (“Section 1983”). Plaintiff states that he served as an
16 agent of the Puerto Rico Police Department (“PRPD”) for over fifteen years and, simultaneously,
17 an undercover FBI informant during “Operation Guard Shack,” during which “dozens of police
18 officers were arrested on corruption charges.” (Docket No. 1 at 5.) Plaintiff also claims he worked
19 part-time at the Guaynabo CompUSA store as the Loss-Prevention Manager, where an agent of the
20 Puerto Rico Special Investigations Bureau and FBI Special Agent Norman Quilichini solicited his
21 assistance with uncovering corrupt activities in the PRPD. (*Id.* at 5-6.) Plaintiff accepted the
22 undercover assignment a few days later. (*Id.* at 6.)

23 Plaintiff states that he worked undercover between 18 and 24 months, compiling records
24 sufficient for a magistrate to issue warrants in over one hundred cases and resulting in “the biggest
25 anti-corruption operation in the Bureau’s history.” (*Id.* at 6-7.) The day after the operation ended,
26 Plaintiff alleges his PRPD supervisors “administratively transferred” him from Bayamon to Gurabo
27 in retaliation for “Plaintiff’s denunciations as a special undercover agent, which involved a great
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1 matter of public concern.” (Id. at 7.) Plaintiff alleges the FBI ordered Plaintiff and his family to stay
2 in a hotel and, subsequently, sequestered in their home due to death threats. (Id. at 8.)
3 Consequently, due to his prolonged absence, he lost his job at CompUSA, but was later rehired.
4 (Id.) Plaintiff also states that his superiors reassigned him to PRPD headquarters in Hato Rey in
5 retaliation for his undercover work, despite his pleas to avoid the area due to the presence of several
6 officers whom he investigated. (Id. at 8-9.) Plaintiff claims his superiors and colleagues consistently
7 insulted him, issued death threats against him, and his superiors refused to provide him and his
8 family with security. (Id. at 9, 11.)

9 Plaintiff submitted his resignation letter on June 8, 2011, stating his intent to resign on June
10 28, 2011. (Id. at 12.) However, on June 27, 2011, Plaintiff attempted to revoke his resignation,
11 which he claims Defendant Reinaldo Bermudez granted on July 6, 2011. (Id.) However, Plaintiff
12 asserts, a letter dated July 11, 2011, “states that Co-Defendant Ms. Yadira Rivera Pabon, Director
13 of Human Resources, proceeded to keep Plaintiff’s resignation effective retroactively [to] June 28,
14 2011 . . .” and remove Plaintiff from the PRPD. (Id.) Plaintiff alleges Defendants failed to afford
15 him the right to a pre-termination hearing. (Id. at 13.) Plaintiff claims violations of the First
16 Amendment, the Fourteenth Amendment’s Due Process Clause, and several Puerto Rico statutory
17 and constitutional provisions. (Id. at 15-17.)

18 Defendants moved to dismiss Plaintiff’s complaint (Docket No. 28), and Plaintiff replied
19 in opposition (Docket No. 38). For the following reasons, the court **DENIES** Defendants’ motion
20 to dismiss. (Docket No. 28.)

I. Motion to Dismiss Standard

22 “The general rules of pleading require a short and plain statement of the claim showing
23 that the pleader is entitled to relief.” Gargano v. Liberty Intern. Underwriters, Inc., 572 F.3d 45,
24 48 (1st Cir. 2009) (citations omitted) (internal quotation marks omitted). “This short and plain
25 statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon
26 which it rests.’” Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

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Under Rule 12(b)(6), a defendant may move to dismiss an action against him for failure to state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must contain sufficient factual matter “to state a claim to relief that is plausible on its face.” Twombly, 550 U.S. at 570. The court must decide whether the complaint alleges enough facts to “raise a right to relief above the speculative level.” Id. at 555. In so doing, the court accepts as true all well-pleaded facts and draws all reasonable inferences in the plaintiff’s favor. Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008). However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Id. at 678-79 (quoting Twombly, 550 U.S. at 555). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not ‘show[n]’-that the pleader is entitled to relief.” Iqbal, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)).

II. Discussion

Section 1983 creates a private right of action for redressing abridgments or deprivations of federally assured rights. Centro Medico del Turabo, Inc. v. Feliciano de Melecio, 406 F.3d 1, 6 (1st Cir. 2006) (citing Cox v. Hainey, 391 F.3d 25, 29 (1st Cir. 2004)). Plaintiff claims Defendants violated his First Amendment rights and failed to afford him due process. The court considers each allegation in turn.

A. Plaintiff’s First Amendment Claim

Plaintiff claims Defendants retaliated against him for working undercover for the FBI by failing to provide him and his family with security detail and imposing a hostile work environment on him for expressing his opinions on a matter of public concern. The First Circuit has articulated a three-part inquiry to determine whether an adverse employment action against a public employee violates First Amendment free speech rights. See Decotiis v. Whittemore, 635 F.3d 22, 29 (1st Cir.

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2011). In sum, the court must: (1) determine whether the employee spoke as a citizen on a matter of public concern; (2) balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of public services, and; (3) determine whether an employee shows that the protected expression was a substantial or motivating factor in the adverse employment decision. Id. The court denies Defendants' motion to dismiss because adjudicating whether Plaintiff satisfies the first requirement of Decotiis is premature at this stage.

Generally, "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." Mercado-Berrios v. Cancel Alegria, 611 F.3d 18, 25-26 (1st Cir. 2010). However, "[g]overnment employees undoubtedly walk a tight rope when it comes to speaking out on issues that touch upon their fields of work and expertise." Decotiis, 635 F.3d at 29. "The [Supreme] Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." Garcetti v. Ceballos, 547 U.S. 410, 418 (2006). The Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Id. at 421.

In Mercado-Berrios, the First Circuit interpreted how to grapple with Decotiis's first threshold, whether the employee spoke as a citizen on a matter of public concern. The Mercado-Berrios court held that the first prong includes "two basic components – (1) what are the employee's official responsibilities, and (2) was the speech at issue made pursuant to those responsibilities – both of which are highly context sensitive." 611 F.3d 18, 26 (1st Cir. 2011). Speech "made pursuant to employment duties" includes speech that "owes its existence to a public employee's professional responsibilities," speech that the employer 'has commissioned or created', speech that the employee 'was paid to' make, speech that the employee's 'duties . . . required him to' make, speech that amounts to the employee's 'work product', and speech that is an 'official

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1 communication[.]” Decotiis, 635 F.3d at 30 (quoting Garcetti, 547 U.S. at 421-23).

2 The court finds the Decotiis court’s examples seem to encompass the facts at bar. The
3 first prong of the Decotiis test requires examining Plaintiff’s job responsibilities. Plaintiff states that
4 he accepted a position as an “undercover corrupt officer” and posed “as a corrupt
5 official offering fellow cops large sums [of] money on behalf of local drug-traffickers in exchange
6 for transporting the drug[s] to another location within the island of Puerto Rico,” worked “his regular
7 8-hour shift as a police officer and his part-time job at CompUSA, in addition to undercover work,
8 which could easily take him an additional 8 to 10 hours a day,” and “performed dozens of
9 undercover drug transactions with active police officers” while the “transactions were recorded and
10 conducted under the supervision of FBI agents.” (Docket No. 1 at 5-6.)

11 Analysis under the second prong reveals that Plaintiff’s speech, for which he alleges the
12 discrimination arose, directly pertains to his official responsibilities. Plaintiff asserts that “in a clear
13 retaliation [for] his denunciations of great public concern that led to corruption indictments in [the]
14 United States District Court for the District of Puerto Rico, he was assigned by Defendants to the
15 PRPD General Headquarter[s].” (Id. at 8.) To reiterate, Plaintiff also claims his superiors and
16 colleagues consistently insulted him, PRPD officers issued death threats against him, and his
17 superiors refused to provide him and his family with security because of his work with the FBI. (Id.
18 at 9, 11.) Plaintiff was transferred “in a continuous retaliation against Plaintiff and as a mitigation
19 mechanism in order to avoid Plaintiff to expose more corrupt officer[s] from Bayamon,” i.e., to
20 prevent him from engaging in the tasks which comprised his responsibilities with the FBI.
21 (Docket No. 38 at 6.) Plaintiff’s speech was “entirely related to matters concerning” the police force
22 and his work with the FBI. Decotiis, 635 F.3d at 31 (quoting Foley v. Town of Randolph, 598 F.3d
23 1, 2-4 (1st Cir. 2010)). These facts squarely fit the mold created by the examples of speech “made
24 pursuant to employment duties” in Decotiis.

25 However, in an abundance of caution and following the example of several courts, the court
26 shall wait until the summary judgment stage before undertaking a comprehensive Garcetti analysis.
27 See Velazquez v. Mun. of Carolina, Civil No. 11-1586 (SEC),*8-9 (Dec. 14, 2012); see also Watts

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1 v. City of Jackson, 827 F. Supp. 2d 724, 728-732 (S.D. Miss. 2011) (counseling reservation of
 2 judgment until summary judgment and providing several factors to consider in analyzing Garcetti
 3 in police retaliation case where officers served as FBI informants). The court urges the parties to
 4 look to the Watts court's factors. For example, how did the PRPD know that Plaintiff was an
 5 informant? How did Defendants learn of the matters for which Plaintiff alleges he was
 6 discriminated? Was Plaintiff legally bound to disclose any observations of corrupt practices,
 7 regardless of formal or informal employment with the FBI? The court will need answers to these and
 8 other questions answered before it can appropriately determine whether to dismiss this case. While
 9 the court is inclined to agree with the conclusion reached by the Watts court, persuasive precedent
 10 dictates that the court abstain. The court would like for the parties to more thoroughly address the
 11 extent to which Plaintiff is, or is not, speaking as a "citizen" for Garcetti purposes.

B. Plaintiff's Due Process Allegations

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 13 Plaintiff next claims that Defendants violated his due process rights by effectuating his
 14 resignation, which Plaintiff alleges he rescinded prior to its effective date and Defendants refused
 15 to accept. Refusal to accept an attempt to rescind a resignation and subsequent termination
 16 without process does not constitute a violation. See e.g., Brammer-Hoelter v. Twin Peaks
 17 Charter Acad., 602 F.3d 1175, 1180 (10th Cir. 2010); Fross v. Monett R-I Bd. of Educ., 431
 18 F.3d 606, 612 (8th Cir. 2005); Ulrich v. City & Cnty. of San Francisco, 308 F.3d 968, 974-76
 19 (9th Cir. 2002); Graehling v. Village of Lombard, 56 F.3d 295, 296-99 (7th Cir. 1995)
 20 (Easterbrook, J., writing for the panel). See also Hardy v. Birmingham Bd. of Educ., 954 F.2d
 21 1546 (11th Cir. 1992) (holding consideration of withdrawal of a resignation letter proper only
 22 because the employer informed the employee that he could do so before the effective date).
 23 Therefore, the court will not consider whether Plaintiff was deprived of process because he
 24 simply failed in his effort to rescind his resignation. See Monahan v. Romney, 625 F.3d 42, 47
 25 (1st Cir. 2010) (citing Stone v. Univ. of Maryland Med. Syst. Corp., 855 F.2d 167, 173 (4th
 26 Cir. 1988) ("If he resigned of his own free will even though prompted to do so by events set in
 27 motion by his employer, he relinquished his property interest voluntarily and thus cannot

